



COMMONWEALTH OF KENTUCKY
OFFICE OF THE ATTORNEY GENERAL

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Hon. Steve Lynn
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Justice and Public Safety Cabinet
Office of Legal Services
Department of Criminal Justice Training
Funderburk Building 521 Lancaster Avenue
Richmond, KY 40475-3102

Re: House Bill 463 (2011 Regular Session), Section 46, amending KRS 431.015

Dear Mr. Lynn:

You have requested the opinion of the Office of Attorney General regarding Section 46 of House Bill 463, 2011 Regular Session, Kentucky Acts 2011 Regular Session, Chapter 2, amending KRS 431.015, effective June 8, 2011. The Attorney General has directed that your questions be discussed in this letter, which does not constitute an opinion of the Office of Attorney General as defined in KRS 15.025. However, we hope that the guidance offered in this letter will be of help to you as you implement new procedures in response to the recent statutory changes.

A. Amendments to KRS 431.015 in House Bill 463

In the 2011 Regular Session, the Kentucky General Assembly passed House Bill 463. The Bill was signed by the Governor and most of its provisions are set to become law on June 8, 2011. Among other changes to existing law, this bill amended KRS 431.015 as it relates to peace officers' arrest authority for misdemeanors. This effected the first substantive change in misdemeanor arrest authority for peace officers in the Commonwealth in nearly 20 years. The Attorney General understands the importance of clarifying this legislation so that police procedure employed in the field remains consistent and just, and ensures ongoing public safety.



As amended KRS 431.015 states (new language is bolded and italicized):

(1) (a) ***KRS 431.005 to the contrary notwithstanding, and except as provided in paragraphs (b) and (c) of this subsection, a peace officer shall*** ~~may~~ issue a citation instead of making an arrest for a misdemeanor committed in his ***or her*** presence, if there are reasonable grounds to believe that the person being cited will appear to answer the charge. The citation shall provide that the defendant shall appear within a designated time.

(b) A peace officer may make an arrest instead of issuing a citation for a misdemeanor committed in his or her presence if the misdemeanor is:

- 1. A violation of KRS Chapter 508, 510, or 527, or KRS 189A.010;***
- 2. An offense in which the defendant poses a risk of danger to himself, herself, or another person; or***
- 3. An offense in which the defendant refuses to follow the peace officer's reasonable instructions.***

(c) A peace officer shall make an arrest for violations of protective orders issued pursuant to KRS 403.715 to 403.785.

(2) A peace officer may issue a citation instead of making an arrest for a violation committed in his presence but may not make a physical arrest unless there are reasonable grounds to believe that the defendant, if a citation is issued, will not appear at the designated time or unless the offense charged is a violation of KRS 189.223, 189.290, 189.393, 189.520, 189.580, 235.240, 281.600, 511.080, or 525.070 committed in his presence or a violation of KRS 189A.010, not committed in his presence, for which an arrest without a warrant is permitted under KRS 431.005(1)(e).

(3) If the defendant fails to appear in response to the citation, or if there are reasonable grounds to believe that he will not appear, a complaint may be made before a judge and a warrant shall issue.

(4) When a physical arrest is made and a citation is issued in relation to the same offense the officer shall mark on the citation, in the place specified for court appearance date, the word "ARRESTED" in lieu of the date of court appearance.

The new law restricts a peace officer's arrest authority for misdemeanors. By replacing the phrase "may issue" in subsection 1(a) of the original statute to "shall issue" in the newly revised

version, the legislature effectively removed an officer's discretion in choosing to cite a misdemeanor offender versus arrest a misdemeanor offender. But for certain specifically delineated exceptions, that statute mandates citations in lieu of arrests. Stakeholders in the Commonwealth's law enforcement community are unanimous in their desire to understand the scope of this legislative change.

B. The Amendments to KRS 431.015 Only Limits the Authority of Peace Officers to Arrest for Some Misdemeanors

The amended language at issue is primarily contained within subsection (1) of KRS 431.015 and pertains exclusively to misdemeanors, not felonies or violations.¹ The first question submitted by the Department of Criminal Justice Training asks whether the amendment of KRS 431.015 limits the authority granted to peace officers by KRS 431.005(1)(d) and (e) to arrest for misdemeanors to the situations and offenses enumerated in those subsections. The plain language of the amended KRS 431.015 makes it quite clear that it is solely meant to limit arrest authority established via KRS 431.005(1)(d) and (e). It is an axiomatic principle of statutory interpretation that if a plain reading of a statute yields a reasonable legislative intent, then that reading is decisive and must be given effect regardless of any consideration of the statute's wisdom. *See King Drugs, Inc. v. Commonwealth*, 250 S.W.3d 643, 645 (Ky. 2008).

However, just as it is clear that the amended law solely limits arresting authority derivative of KRS 431.005(1)(d) and (e), it is equally clear that the amended law provides certain exceptions to its own restrictions. Those exceptions—four broad categories—are outlined in subsection (b) and (c) of the amended law. As a general matter, the new statute makes clear that the first three categories of exceptions apply *only* if the misdemeanor is committed in the presence of an officer. KRS 431.015(1)(b).

The three (3) exceptions allowing for an arrest in lieu of citation if an officer is present at the commission of the offense are: 1) any misdemeanor contained within KRS Chapters 508 (Assault and Related Offenses Chapter),² 510 (Sexual Offenses Chapter), 527 (Offenses Relating to Firearms and Weapons Chapter), and KRS 189A.010 (Driving Under the Influence); 2) any misdemeanor in which the defendant poses a risk of danger to himself or another person; and 3) any misdemeanor in which the defendant refuses to follow the peace officer's reasonable instructions.

A fourth category of exceptions exists. An officer *shall* make an arrest for misdemeanor violations of protective orders pursuant to KRS 403.715 to 403.785, regardless of whether the offense is committed in the presence of the arresting officer.

¹ Arrests for violations are governed by the pre-existing subsection (2) of KRS 431.015, which was not changed by HB 463.

² Arrests for domestic violence, "when the peace officer has probable cause to believe the person has intentionally or wantonly caused physical injury to a family member or member of an unmarried couple," are still permitted under KRS 431.005(2).

C. The Application of the Amended KRS 431.015 is Limited to KRS 431.005 and Does Not Apply to Statutes Providing Specific Arresting Authority.

Your second question asks whether the language in KRS 431.015 is limited to the arresting authority granted in KRS 431.005 or if it also limits arresting authority provided in other, more specific statutes. We believe KRS 431.015 only limits arresting authority conferred via KRS 431.005. Examples of arrest authority conferred by way of other statutes, and thus unaffected by this recent change, include KRS 222.203 (alcohol intoxication), 433.236 (shoplifting), 436.605(2) (cruelty to animals) and 150.092(3) (hunting on private property without permission).

The plain language of amended KRS 431.015 makes clear that its application is limited to KRS 431.005 and does not apply to any other statutes. “[I]f a plain reading of the statute yields a reasonable legislative intent, then that reading is decisive and must be given effect regardless of the canons and regardless of our estimate of the statute's wisdom.” *King Drugs, Inc. v. Commonwealth*, *supra*. In determining legislative intent, we must refer to the language of the statute and are not at liberty to add or subtract from the legislative enactment or interpret it at variance from the language used. *Stogner v. Commonwealth*, 35 S.W.3d 831, 834 (Ky. App. 2000); *see also White v. Check Holders, Inc.*, 996 S.W.2d 496, 497 (Ky.1999) (holding that when the words of a statute are clear and unambiguous and express legislative intent, there is no room for construction or interpretation and the statute must be given effect as written) (citations omitted).

Furthermore, the prefatory “notwithstanding” contained in subsection 1(a) of KRS 431.015 exclusively modifies KRS 431.005 and no other arrest authority statute. We conclude therefore that the amended version of KRS 431.015 only limits KRS 431.005, and was not intended not to usurp or impede arrest authority derived from other statutes. The amended statutory language contained within KRS 431.015 provides no basis to extend its application beyond KRS 431.005.

Although we believe that the plain language of the amended statute unambiguously supports our conclusion, we note that the long-standing principle of *expressio unius est exclusion alterius* further underscores this legal outcome. It has long been held that the specific enumeration of one thing amounts to an intentional exclusion of the things not listed. *Fox v. Grayson*, 317 S.W.3d 1, 8-9 (Ky. 2010) (reaffirming rule that the mention of one thing implies the exclusion of another.) (citations omitted). While specifically and expressly referring to KRS 431.005, the new 431.015 excludes any reference to any other arresting authority. Thus, any other independent arresting authority must be given the opposite and contrary treatment than KRS 431.005.

We also decline to support any suggestion that the amended KRS 431.015 operates as an implied amendment of arrest authority statutes beyond KRS 431.005. A statute can be considered amended by implication by a later statute if the two statutes are repugnant to each other and irreconcilable, or if the later act must cover the whole subject of the earlier act. *Hallahan v. Sawyer*, 390 S.W.2d 664 (Ky. 1965).³ The amended KRS 431.015 does not operate as an implied amendment or repeal of the other arrest authority statutes because KRS 431.005 and 431.015 do not exclusively define arrest authority; many other chapters exist within the Kentucky Revised Statutes which grant peace officers arrest authority.

D. The Application of the Exclusionary Rule

One of the more salient concerns resulting from the amendments to KRS 431.015 is the potential collateral consequences on police procedure in the field. Since the 1960s, police officers and criminal prosecutors have operated within the framework of the so-called exclusionary rule. The exclusionary rule is a judicially created remedy designed to safeguard Fourth Amendment rights.

But even within the framework of the exclusionary rule, the United States Supreme Court has held that if an officer has probable cause to believe that an individual has committed even a very minor criminal offense in his presence, he may arrest the offender without violating the Fourth Amendment. *Atwater v. City of Lago Vista*, 532 U.S. 318, 354 (2001). The Court noted that the standard of probable cause applies to all arrests, without the need to ‘balance’ the interests and circumstances involved in particular situations.” *Id.* The Kentucky Supreme Court adopted this probable cause standard for warrantless misdemeanor arrests under KRS 431.005(1)(d). *Commonwealth v. Fields*, 194 S.W.3d 255 (Ky. 2006). When an arrest satisfies the Fourth Amendment probable cause standard—even though the misdemeanor arrest is not authorized by state law—that arrest is constitutional. *Virginia v. Moore*, 553 U.S. 164 (2008). Consequently, a search incident to that arrest is also constitutional and the exclusionary rule will not require suppression of the evidence obtained as a result. *Id.* Likewise, the Kentucky Supreme Court held that the exclusionary rule will not be applied to statutory violations which do not violate the Constitution in the absence of statutory language requiring the exclusion of the evidence obtained from violating the statute. *Johnson v. Commonwealth*, 327 S.W.2d 501, 511 (Ky. 2010). We note that KRS 431.005, 431.015, and the remainder of KRS Chapter 431 lack any directive to exclude evidence for an arrest in violation of those statutes. However, if an officer issues a citation in lieu of an arrest, the officer may not search the offender merely because of the offender’s commission of a misdemeanor or violation of a statute. *Knowles v. Iowa*, 525 U.S. 113 (1998).

E. Conclusion

In summary, the recent amendments to KRS 431.015 only limit arrest authority established pursuant to KRS 431.005(1)(d) and (e). In the absence of express language

³ See also, *Dreidel v. City of Louisville*, 105 S.W.2d 807 (1937), *Hallahan v. Commonwealth*, 391 S.W.2d 378 (Ky. 1965)(companion case to *Hallahan v. Sawyer*); *Fiscal Court Com’rs of Jefferson County v. Jefferson County Judge/Executive*, 614 S.W.3d 954, 959 (Ky. App. 1981); *Pletcher v. Commonwealth*, 992 S.W.2d 852, 855 (Ky. App. 1998); *Osborne v. Commonwealth*, 185 S.W.3d 645, 649 (Ky. 2006).


suggesting otherwise, the revised KRS 431.015 does not limit arrest authority conferred upon peace officers by any other specific statutes. Because KRS 431.005(1)(d) and (e) govern the vast majority of misdemeanor arrests, the Attorney General's interpretation of the amended KRS 431.015 statutes does not defeat the purpose of the amendments made by House Bill 463.

Sincerely,

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